IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 14577

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

F. W. WOOLWORTH CO.,
Respondent

ON PETITION FOR ENFORCEMENT OF AN ORDER OF NATIONAL LABOR RELATIONS BOARD

BRIEF AND APPENDIX ON BEHALF OF RESPONDENT, F. W. WOOLWORTH CO.

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Jurisdiction

This case is before the Court upon petition of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 USC, Section 141 *et seq.*)* for decree to enforce the final order issued against the Respondent by the National Labor Relations Board on July 20, 1954 (R. 64).** Jurisdiction of this Court is based on Section 10(e) of the Act. The alleged unfair labor practices occurred in San Bernardino, California, within this judicial circuit. The Board has found that Respondent was engaged in interstate commerce (R. 25).

* All references to the Act hereafter in this brief refer to the NLRA, as amended by LMRA 1947.

** References to the portion of the printed record are designated "R".

Statement of Facts

On March 11, 1952, a collective bargaining agreement was entered into between F. W. Woolworth Co. Store No. 433, herein called the "Respondent," located in San Bernardino, California, and the Retail Clerks Union, Local 1167, A.F. of L., herein called the "Union." The contract was to be in full force from the date of execution until March 5, 1954, (R. 26; 8 to 15, 16).

Section 5 of the contract established the basic minimum wage rates to be paid to all employees (R. 9). Section 17 of the contract, the management prerogative clause, reserved to the Respondent among its "exclusive responsibilities" the right to adjust the wage rates above the minimums set forth in Section 5 or, in effect, to grant merit increases (R. 13). Therefore, the actual wage above the minimum wage was to be solely in the Respondent's discretion.

In Section 21(b) the contract further provided for a wage adjustment during the life of the contract on March 7, 1953. This adjustment was to apply only to the basic minimum wage rates and was to be made in accordance with the change in the cost of living set forth in the National Bureau of Labor Statistics Index. A larger adjustment in these basic hourly minimum wage rates could be made by mutual agreement between the parties (R. 14 to 15; 26 to 27).

Several days after the execution of the agreement, upon the Union's request, the Respondent supplied it with a list of all the employees in the bargaining unit. The Union acknowledged its receipt and further requested hour and actual wage data on each employee for the period prior to the executed agreement. This information was not furnished (R. 22; 28; 81 to 82).

At the time of the execution of the collective bargaining agreement the Respondent and Union devised a form where-

by Respondent would notify the Union of new employees. Such employees were informed about joining the Union within 30 days of their employment. These notifications of new employees were received by the Union from the Respondent but were not kept as records by the Union (R. 31; 88 to 91).

On January 31, 1953 the Union requested a conference concerning the wage adjustment pursuant to Section 21(b) (R. 17; 27; 58). The BLS Index at this time showed approximately a 1.42 cents per hour increase would be required, or about 57 cents for a 40 hour week.

During the negotiations taking place in March, the Union submitted to the Respondent a proposed increase of $2.00 per week, and on March 13th the Respondent offered an increase of $1.00 per week (R. 27; 15 to 19, 82 to 87).

The Union, in the course of the discussions, renewed its request for actual wage, hour and classification data, this time asserting that the information was needed "for the intelligent and equitable administration of the agreement" as well as for wage adjustment. The request was refused along with other similar requests in the course of the negotiations (R. 20, 22; 28; 58; 82 to 88, 102.)

By letter dated May 1, 1953, without having received the requested information, the Union notified the Respondent that it accepted the Respondent's offer to increase the basic minimum wage to $1.00, which was in excess of the actual cost of living increase of 57 cents as indicated above (R. 20, 21; 27; 58, 99). The Respondent acknowledged the acceptance of the increase on May 2, 1953.

Notwithstanding the reaching of the agreement the Union, on May 5, 1953, again requested the actual wage data and the Respondent did not reply (R. 22; 28; 87, 102). On June 18, 1953 the Union filed a charge with the Board, alleging, among other things, that the Respondent violated Sections

8(a)(5) and (1) of the Act by rejecting the Union's request for this payroll information.

The Board concluded that whether the Union's request for payroll information be considered as relating to the pending negotiations for a general wage adjustment or as relating to the administration of the parties' collective bargaining agreement, Respondent violated Sections 8(a)(5) and (1) of the Act by refusing to comply with the request (R. 58 to 59).

Accordingly, the Board ordered Respondent to cease and desist from the unfair labor practice found and affirmatively to furnish the Union, upon request, the name, classification, hours worked and wage rate of each employee in the appropriate unit and to post the usual notices (R. 63 to 64).

Statement of the Issue

This case involves but a single broad question of law, as follows:

Did the Respondent's refusal of the Union's request for information relating to names, compensation, hours and classifications of employees within the bargaining unit constitute a violation of Section 8(a)(1) and 8(a)(5) of the Act?

Summary of the Argument

The Board's order holding the Respondent guilty of a refusal to bargain under 8(a)(5) and (1) by a refusal to furnish requested wage data to the Union constitutes an unlawful interference by the National Labor Relations Board with terms, which were agreed upon across the bargaining table, and with rights guaranteed the individual employee under the National Labor Relations Act, as amended in 1947.

Retrospect reveals that the Union, in March 1952, agreed to a contract with a management prerogative clause, Section 17 of the Contract. The contract had the usual maximum work and minimum wage provisions and provided for a general wage adjustment based on the increased cost of living index. It also provided for any further increase that the parties might agree upon. Economic weapons of strike and lockout were barred during the wage adjustment period.

A demand for a list of all employees with their job classification and wage rates was made by the Union about the time of the cost of living wage reopening, and the request was denied. Then 8(a)(5) and (1) violations were charged by the Union for refusal to furnish the information. Nevertheless, shortly thereafter, a wage adjustment higher than the cost of living index was granted and accepted by the Union. The Board in upholding the 8(a)(5) and (1) charge acted in contravention of the fundamental principles of policy and purpose set forth by Congress in its "Findings and Statement of Policy" promulgated in connection with the new Act. A study of the substantive provisions of the Act clearly demonstrates that the Board order is a direct repudiation of the intent of Congress in passing the Act to protect rights of individual workers in their relations with labor organizations, employers and their fellow employees.

The effect of the Board order is to obligate an employer to give the labor organization information on merit increases granted to the individual employees, despite the fact that these increases are solely in the nature of a special reward for individual efforts. The Union traditionally has bargained as to minimum wages only, and, even further, has allowed the Respondent to reserve the right to control the wage increases above the minimum by the management prerogative clause (Section 17 of the Contract). In these wage increases granted above the minimum,

not only is there an exclusive right in the employer to grant such, but also there is a duty to the employee to withhold information as to such from a third party, since an individual's wage is protected by his right of privacy.

The Act emphasizes the individual rights of an employee, which the Wagner Act had not protected. The fact that individual rights are now subject to protection has not been completely overlooked by the Courts, but as is sometimes the case when a major change is adopted, the ones concerned are somewhat slow in arriving at the full meaning and application of it. The Board to date has not applied the change to wage data cases. The right of privacy has been expressly recognized by the Court in *NLRB* v. *Boston Herald-Traveler Corp.,* 210 F. 2d 134 (C. A. 1, 1954) a wage data case, and individual rights in general were recognized in *Elgin J. & F. R. Co.* v. *Burley,* 325 U. S. 711 (1945), under the Railway Labor Act which gives somewhat similar protection to the individual. However, in general the full effect of the changed policy has not been urged by parties to such questions or recognized by the Board or the Courts. In fact, so slow is the recognition of the change taking place in actual practice, that even now the only case authority available are either Wagner Act cases or cases based directly thereon.

In the problem facing the Court in the instant case, the case authority cited by the Board has been rendered inapplicable by the Act, although the Board has disregarded this in using Wagner Act precedent in this and other wage data cases. It is contended further that the Respondent is not chargeable with 8(a)(5) and (1) violations in view of the express language of the contract. Assuming the Union did have a right to the information which it unsuccessfully sought, which is denied, this right was waived when the management prerogative clause, Section 17, was included in the contract. When the Union waived its participation in merit increases, it rendered irrelevant any inquiries in this area from which it had already voluntarily excluded itself.

There is claimed no violation of the contract which might conceivably make such information relevant. Since a management prerogative clause has been declared a valid clause by the United States Supreme Court in *NLRB* v. *American Ins. Co.,* 343 U. S. 395 (1952), a union should not be allowed to defeat the effect of such a clause indirectly by charging an 8(a)(5) and (1) violation.

The Board fails to recognize that when the parties by agreement set up a specific machinery to resolve their differences, they should be forced to exhaust this machinery before a Board remedy is invoked. By Section 19 of the collective bargaining contract, the parties agreed to submit to the grievance and arbitration machinery any dispute arising under the interpretation of a clause of the contract. In *Timken Roller Bearing Co.* v. *NLRB,* 161 F. 2d 949 (C. A. 6, 1947), the Court said:

> " * * * If the law penalizes one party to the contract for standing on a bargain not itself violative of laws there may still be compulsion to bargain but the virtue of an agreement vanishes * * * The law we think does not compel this result."

The Court then indicated that the union should have used the contract machinery before it applied for a Board remedy. The same problem is encountered here. The Board's decision vitiates any arbitration agreement and substitutes administrative ukase for the voluntary agreement between the parties.

Also, even if the unions are entitled to such information, the Union here is not entitled to the type of information requested because it is not necessary or relevant to the administration of the contract. Since the Courts have uniformly recognized a standard of relevancy in regard to the requirement to furnish wage data, it follows logically that each case will be judged on its particular set of facts.

The Board also failed to consider the type of information that the Respondent must furnish. The Board merely estab-

lished a blanket rule that all that was requested must be given. They did not distinguish what parts were relevant. In doing this, it disregarded cases establishing limitations on the form and amount of such information required to be furnished.

The *per se* right to such information of the Union adopted by the Board in its decision and order is contrary to the Board's delegated functions and to the terms of the Act. The adoption of such a rule is inconsistent with the "good faith" standard which permeates the Act, as illustrated in the *American Ins. Co.* case, *supra.* For this reason, our highest court in its mandate rejected an urged unfair labor practice *per se* rule with reference to the insistence on a management prerogative clause.

The duty to furnish such information is a flexible treatment of the substantive terms of the contract. Such substantive terms of a contract are not matters for Board determination but rather for collective bargaining. *American Ins. Co., supra.* They cannot be affected indirectly by a Board order dealing with the flexible treatment or administration of these substantive terms such as was issued in the instant case. Upholding the Board's order would be tantamount to an encouraging harassment in the whole field of labor relations.

POINT I

The order of the Board violates the rights of employees under the National Labor Relations Act as amended in 1947.

The dispute between the Board and Respondent arises over the Respondent's refusal to give the Union wage information regarding the actual wage rates paid to each employee. The request for job classifications is not of im-

portance because there are only two classes of employees known in the store involved (R. 94) and petitioner makes no point of such request in its brief.

The Board's order would obligate Respondent to give the Union information on merit increases granted to individual employees along with names, hours and classifications. These merit increases are special rewards to an employee for excellent service above the contract rates set forth in the collective bargaining agreement. Respondent by contract is compelled to pay the contract rates which are the minimum rates.

This Union traditionally has bargained in its contracts for minimum wage schedules and maximum work week provisions. Where the employer reserved the right to make adjustments in pay above those minima as are found in the management prerogative clause, Section 17 of the agreement (R. 13), the employer is not compelled to reveal the amount of such merit increase to the Union. This result would be achieved indirectly if he were required to supply a list of all his employees with the actual wages being paid to each employee.

The Board refers briefly to this principle in its order (R. 63).

However, in its decision the Board has failed to take cognizance of individual rights of employees protected by the Act.

A. The Act expanded the scope of protection to include the rights of the individual employee.

The Act incorporated the intention of Congress to protect the rights of employees in their personal concerns and in their relations with employers and labor organizations.

In this respect the Act should be contrasted with the Wagner Act,* as the Findings and Declaration of Policy of that statute contained no such reference.

The Findings and Declaration of Policy of the Wagner Act are set forth in the Appendix at page 1a.

The "Short Title and Declaration of Policy" of the Taft-Hartley Act reads in part as follows:

> "Section 1.(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized *if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other,* and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.
>
> "It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to *protect the rights of individual employees in their relations with labor organizations* whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce." (Italics added.)

Section 7 of both the Wagner Act and the Act contains a definition of the rights of employees. In the present statute Section 7 reads as follows:

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* The National Labor Relations Act, 49 Stat. 449, 29 U.S.C. Secs. 151 *et seq.* before amended by the Labor Management Relations Act in 1947. Hereafter referred to as the Wagner Act.

"RIGHTS OF EMPLOYEES

"Sec. 7. Employees shall have the right to self-organization, to form, joint, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in *other* concerted activities for the purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).*"

(2 Leg. Hist. of LMRA 1947, 1666)

The words italicized were added to Section 7 of the Wagner Act.

Does the fact that a union has become the bargaining representative, permit that union to compel an employer to reveal matters to aid the union to invade the privacy of a worker to a degree not permissible before the union became bargaining agent?

The answer to this question must be "no".

The Act does not grant such a privilege. Nowhere in the Act as set forth above or in its other provisions can such an obligation on the part of the employer be found or implied, nor can such an obligation be found in the statements of the sponsors of the Act. On the contrary, unequivocal language to the opposite effect may be found.

B. The legislative history of the Act leading to its enactment emphasizes the Act's intent to safeguard individual employee rights.

In many instances in order to obtain the full meaning of a statute, or to resolve doubts as to its proper interpretation, the question will be clarified by looking at the legislators' discussions and statements in drawing and enacting

the statutes. The following excerpts of the legislators are set forth here to show the background of the Act.

"Mr. Hartley. [Co-author of the Act] * * *

"This year, this Congress gives to these working men and women their bill of rights.

* * * * *

"This bill guarantees to him:

* * * * *

"Thirteenth. The right to receive *his pay in his pay envelope,* without the employer and the union spending it for him, checking it off for union dues or for *other purposes*

* * * * *

"Fifteenth. The right to be free of threats to his family for doing things in connection with union matters that an employer or a union does not like—

* * * * *

"Sixteenth. The right to settle his own grievances with his employer—[93 Cong. Rec. 3535. Emphasis added.]

* * * * *

"Mr. McConnell. * * *

"Mr. Chairman, for the first time in any bill submitted to this House for vote, the American workingman is to be protected from the unfair labor practices of labor organizations, by provisions which, in effect constitute a bill of rights for workers.

* * * * *

"The record of the testimony, the public-opinion polls, and the mail from people throughout the length and breadth of the land, demand correction of these conditions. They cry out for the adoption of fair and equitable rules of conduct to be observed by labor and management in their relations with one another; for the protection of the rights of individual workers in their relations with labor organ-

izations and employers; and for the recognition that the public interest is paramount in labor disputes affecting commerce, which endanger the health, safety, or welfare of all our citizens. [93 Cong. Rec. 3549]

* * * * *

"Mr. Gwinn of New York. * * *

"The bill rejects the contention that organized groups may assert and force an individual to give up his basic rights for any alleged higher right of a group. The Committee finds such so-called group rights lead to the exploitation of individuals as well as of the public generally. [93 Cong. Rec. 3554. Emphasis added.]

* * * * *

Senator Taft, co-author of our present Act, on April 23, 1947 had the following to say:

"In particular I believe that in dealing with small business, with farmers, and even with the workers themselves, the labor union leaders have acquired a power which today the people resent and which inevitably has been abused. Many of our labor leaders are just as judicial and as fair as anyone could wish them to be, but extreme power, unreasonable power, cannot be granted to any group of men without a large number of them being willing to exercise it to accomplish ends which are not reasonable. Polls taken today show that union members themselves resent the power of labor union leaders. Even on the question of the closed shop, which the union leaders are most vigorously defending, the polls show that more than half their men are actually opposed to the position the leaders are taking, because apparently they feel that today they are at a great disadvantage in dealing with union leaders, and that the power given to the leaders by existing legislation is so great that *the individual is unable to exercise their right to free speech, his right to work as he pleases, and their general right to live as he pleases."* 93 Cong. Rec. 3951 (Emphasis added.)

From these words it is clear that the Act was intended to protect rights now recognized as being inherent in the employee. Such rights are not diminished by a collective bargaining agreement and the Union's right to obtain data as to minimum wages. The right of privacy in the employee to be free from interference by either the employer or the *union,* therefore, is a validly asserted right. This includes a matter as confidential as the exact wage that an employee is earning, inclusive of his merit increases. This should be and is naturally a zealously protected right. As to private affairs, the United States Supreme Court has said in *Sinclair* v. *U. S.,* 279 U. S. 263, 292 (1929):

> "It has always been recognized in this country, and it is well to remember, that few if any of the rights of the people guarded by fundamental law are of greater importance to their happiness and safety than the right to be exempt from all unauthorized arbitrary or unreasonable inquiries and disclosures in respect of their personal and private affairs."

Because of this the Respondent would violate a duty of confidence owed to his employees if this wage information were supplied to the Union. If the individual wants to waive his right of privacy, he may give the information to his union. This situation may be considered analogous to the procedure set up to allow an employer to check off an employee's dues owed to his union. The employee's consent in such a case must be obtained before this is allowed. No such waiver of the protected rights of employees has been shown in the instant case.

C. Respect for individual employee rights has been recognized by some courts paying heed to the changes in labor relations philosophy.

A right of privacy existing in the individual employee was expressly recognized in *NLRB* v. *Boston Herald-Traveler Corp., supra,* where an employer, though he had given certain wage information to the union, omitted giving a list

of employees with which these wages could be coupled. The Court in this case expressly found the Respondent's argument setting forth a right of privacy more persuasive than the argument set forth by the Board. In so recognizing this right, the Court said at page 137:

> "Furthermore, we think that if the Board had meant to invade privacy by requiring disclosure of individual names joined with actual salaries, it would have said so in unmistakable terms."

This is the first case under the new Act formally recognizing the Act's full meaning by upholding the right of privacy.

The Board in the *Woolworth* case, significantly, though indirectly, in the following language appreciated that there were confidential rights in the data involved, but then acted inconsistently when it ignored these rights in its determination of the issue:

> "Similarly, we cannot assert that the questioning of the employees was any more consonant with a desire to undermine the union than it was to respect the interests of the employees themselves in having individual wages kept as a confidential matter between employer and employee; for the dissemination of wage information of the sort requested by the union affects many other relationships than those between employee and union and employer * * * " (R. 60).

In *Elgin J. & E. R. Co.* v. *Burley, supra,* the United States Supreme Court, interpreted the Railway Labor Act, which preserves the right of the individual to process his own grievances rather than the union in the absence of express authorization given to the latter by the employee. The Court exercised its power to enforce the statute as the legislators meant it to be enforced: a shield for the individual employee and a recognition of his rights. The

Court in so holding used language equally applicable to our case. At page 733 it said:

> "It would be difficult to believe that Congress intended by the 1934 amendments, to submerge wholly the individual and minority interests, with all power to act concerning them, in the collective interest and agency, not only in forming the contracts which govern their employment relation, but also in giving effect to them and to all other incidents of that relation. Acceptance of such a view would require the clearest expression of purpose. For this would mean that Congress had nullified all pre-existing rights of workers to act in relation to their employment, including perhaps even the fundamental right to consult with one's employer, except as the collective agent might permit. Apart from questions of validity, the conclusion that Congress intended such consequence could be accepted only if it were clear that no other construction would achieve the statutory aims."

Since the Court in the *Elgin* case upholds individual rights because it could not imply their submergence from the statute, in the instant case there is no alternative but to uphold the right of privacy of the individual where the *expressed intent* of the statute is that individual rights should not be subordinated.

The Court, later in the *Elgin* case, at page 744, states:

> "The collective agreement could not be effective to deprive the employees of their individual rights. Otherwise those rights would be brought within the collective bargaining power by a mere exercise of that power, contrary to the purport and effect of the Act as excepting them from its scope and reserving them to the individuals aggrieved. In view of that reservation the Act clearly does not contemplate that the rights saved may be nullified merely by agreement between the carrier and the union."

This language is even stronger to the effect that the arrival at a collective bargaining agreement does not de-

prive the individual of rights expressly reserved to him by the statute. Applying this doctrine logically, the alleged reason given for the requested data, administration of the collective bargaining agreement, should not operate to deprive parties of their confidential rights reserved to them by the Act.

D. Authorities cited by the Board as setting forth a rule under the Act that an employer unqualifiedly must supply individual wage data to a Union on demand do not affect the instant case.

As indicated later, all the cases cited by the Board recognize the rule of relevancy as to the wage data required to be furnished the union by an employer with the exception of the *NLRB* v. *Whitin Machine Works,* 217 F. 2d 593 (C. A. 4, 1954). This rule requires that each fact situation must be considered separately, thus negating any possibility that one case holding could be automatically binding in another situation where the factual elements are bound to differ.

The basic cases which laid a foundation for later authority cited were based on Wagner Act thinking or were decided under the Wagner Act itself and not the present Act, which innovated the protection of the rights of the *individual* employee in his relations with labor organizations.

The case of *Aluminum Ore Co.* v. *NLRB*, 131 F. 2d 485 (C. A. 7, 1942), was decided under the Wagner Act. The case is also distinguishable on its facts. The issue was whether employer, "in its *negotiations* with the union, acted unilaterally and refused to furnish information it was bound, under the *intent and purport of the act,* to supply, thereby avoiding collective bargaining." (Emphasis supplied.) During the bargaining for wage increases the employer had refused to give the union certain wage data as being confidential and then instituted a unilateral wage

increase, thus excluding the union from bargaining. The Court held the Company guilty of an unfair labor practice.

This case is distinguishable on three grounds: (1) the refusal occurred during negotiations and not during the life of the contract, as in the instant case; (2) it was coupled with a unilateral wage increase which denied the union the basic right to bargain, and therefore was an independent instance of bad faith, as opposed to the *Woolworth* case where unilateral individual wage increases were authorized by the management prerogative clause; (3) it was decided under the Wagner Act where there was no express recognition of an employee's rights as an individual.

Similarly, in *NLRB* v. *J. H. Allison, Co.,* 165 F. 2d 766 (C. A. 6, 1948), another case decided under the Wagner Act, citing the *Aluminum Ore Co.* case, the Court held that the company was under a duty to bargain on merit increases *where the contract was silent on such* and it must supply full information with respect to those merit increases.

There is a basic distinguishing feature aside from the important fact that it was a Wagner Act decision. There was involved a merit increase concerning which the union had not waived its right to be consulted on. Because of this the unilateral increases granted certain individuals were instances of bad faith. In contrast to this, in the instant case, the Union had no right to bargain as to the amounts of merit increase as it had given the Respondent exclusive jurisdiction over such in the management prerogative clause. Therefore what was necessary in the *Allison* case is not so in the instant case.

Cases under the new Act on the question of furnishing wage data have come up in various Circuits. The majority of the cases appear in the Second Circuit. Taking them in chronological order, starting with the Second Circuit, the first case is *NLRB* v. *Yawman & Erbe, Mfg. Co.* 187 F. 2d 947 (C. A. 2, 1951).

In the *Yawman* case, the union sought current and past individual wage data for negotiating purposes. The Court held that despite the fact that a contract was reached while the proceedings on the charge were pending, this did not prove that the information was irrelevant when requested. The inference to be drawn by this is that a contract in hand is more favorable than the delay. For authority the Court cites the two Wagner Act cases discussed above, the *Aluminum Ore* case *supra* and the *Allison* case *supra.* No mention was made of the fact that they are Wagner Act cases and not Taft-Hartley cases.

Other distinguishing features are the fact that the information required in the *Yawman* case was for wage negotiations and not contract administration; there was no express or implied waiver by a management prerogative clause to the right to such information as in the instant case; and that no grievance procedure was alleged that might have taken this out of the jurisidiction of an unfair labor practice proceeding.

A year later, in the case of *NLRB* v. *Jacobs Mfg. Co.,* 196 F. 2d 680 (C. A. 2, 1952), the Court held that the refusal by a company to show its books and sales records for the preceding year to the union, to see if the company was able to grant a wage increase, was an 8(a)(5) violation. This case is clearly not in point: first, because it concerns a different type of data; second, it concerns the bargaining stage and not the administration of a contract; third, there was an over-all lack of good faith on the part of the company noted by the Court, since there was an independent refusal to bargain as required by 8(d) of the Act; fourth, no waiver was involved; and finally, again the Court did not note the changing policy of the Act and cited the *Yawman* case *supra,* which was based solely on Wagner Act cases.

In *NLRB* v. *Otis Elevator Co.* 208 F. 2d 176 (C. A. 2, 1953) the Court held that the company must give to the union its time study data. This case is distinguishable on

the type of information sought, and because it arose in the bargaining stage. Authorities cited by the Court were the *Allison* case (decided under the Wagner Act), the *Yawman* case (citing only Wagner Act cases as authority) and the *Jacobs* case (citing only the *Yawman* case).

Finally, in the Second Circuit, the case of *NLRB* v. *New Britain Machine Co.,* 210 F. 2d 61 (C. A. 2, 1954) was decided. The demand arose originally during the negotiations, and the contract agreed upon included a management prerogative clause. In holding that the company must grant the information despite the fact a contract was signed, the Court found that the union had expressly reserved its right to such information on signing and thus no waiver was involved. In contrast to this, the prerogative clause in the instant case effects a waiver which the *New Britain* case implies could be effected. It is to be noted that again the Court failed to cut loose from Wagner Act authority. It cited the *Yawman, Jacobs* and *Otis* cases, and in each, as shown above, the Court did not recognize the change in policy *expressly* contained in the new Act.

Authority is also cited for the Board's position in the First and Third Circuits. In the First, the case of *NLRB* v. *Leland-Gifford Co.,* 200 F. 2d 620 (C. A. 1, 1952), is cited. Here the Court held that the company must disclose individual wage data, although it must initially be noted that the employer tacitly conceded that he was required to give individual wage data.

The case is distinguishable on three grounds. First, the request arose for contract negotiation purposes; second, actual inequities between union and non-union employees were shown; and third, only the amount of information required to cure these inequities was involved.

As authority the Court cites the two Wagner Act cases discussed above, namely, the *Allison* case and the *Aluminum Ore* case; and two Second Circuit cases based on the afore-

mentioned cases, namely, the *Yawman* and the *Jacobs Mfg. Co.* cases, discussed above.

In the Third Circuit the authority cited in *NLRB* v. *Hekman Furniture Co.,* 207 F. 2d 561 (C. A. 6, 1953). The individual wage data was requested during negotiations for a wage increase during the life of the contract pursuant to a wage reopening provision and the Court upheld the Board's order to furnish it. Since the Woolworth general increase is based solely on the increase in cost of living even at the wage adjustment stage, the same necessity for the information does not arise. As to individual increases, the Woolworth Company was given exclusive right to control them. Other distinguishing points are that the Board indicated a general bad faith by the Hekman Company in bargaining, that there was no waiver of the information in the *Hekman* case, and finally, that there was no primary remedy of an arbitration procedure.

For authority the Third Circuit relied on the same two Wagner Act cases, *Allison* and *Aluminum Ore supra,* and followed them up with two cases which were based directly on these Wagner Act cases, namely, the *Yawman* and the *Leland-Gifford* cases *supra,* which were discussed above. The Courts, therefore, to date, have generally made the transition from the Wagner Act to the present Act, without having the right of privacy of an individual in his exact wage urged before them.

On the basis of the type of authority cited, it is urged that the Court disregard these cases as a precedent since they do not recognize the intent of the present Act, manifested by an altered labor relations policy. In failing by their decisions to recognize the change, the Board sustains cases as authority evolved under sections of the old Act which the new Act was intended to abrogate.

POINT II

The Respondent is not properly chargeable with an 8(a) (5) and (1) violation in view of the express language of the Contract.

For two reasons derived from the terms of the contract itself the Respondent should not be charged with an 8(a) (5) and (1) violation. The first is that the Union expressly waived any right that it had to the information sought by virtue of the contract agreed upon, and the second is that the Union is prohibited from using the Board remedy before it has exhausted the contract grievance procedure.

A. The Union waived its "Right", if any, to the information sought, by virtue of Section 17 of the Contract.

Section 17 of the collective bargaining agreement (R. 13) reads as follows:

> "*Management Functions.* The management of the store and the direction of the store personnel, including but not limited to, the right to hire, suspend, layoff, dismiss, discipline, transfer, promote, or the establishment of working schedules, training methods, and the assignment of employees to jobs, to adopt or remove incentive or bonus systems, to adjust wage rates above those contained in this agreement, and other management functions not specifically mentioned herein, are exclusive responsibilities of the Employer."

Assuming the fact, which is denied, that the Union had a "right" to information about individual wages, upon entering into a collective bargaining agreement dated March 11, 1952 (R. 8), and more specifically by agreeing to the terms of Section 17 of that agreement, such right, if it existed at all, was waived.

The Board asserts in its brief that since the Respondent is given sole discretion in the field of merit increases such information is vital to the Union in its search for inequities. The Board thus admits the Union's disqualification to act in the area of merit increases, yet then tries to avoid the effect of the disqualification. No inequities have been alleged in the charges preferred by the Union, and, if it is a "cloak for discrimination" as the Board asserts, it is a cloak voluntarily supplied to the Respondent by the Union in their contract agreement.

The point, also advanced by the Board, that this information is necessary to justify continuing such a contract in the future, is not properly asserted at this time. This is a matter for bargaining when the present contract is terminated and negotiation for future contracts are begun.

The Union expressly consented to the granting of "merit" increases by Respondent to employees who earned them. Since the functions outlined in Section 17, including merit increases, are designated "exclusive responsibilities" of Respondent, the Union was not entitled to individual names and rates which in effect would reveal which of Respondent's employees had received merit increases and in what amounts.

There is no claim that there is any violation of the contract. Any employee who failed to receive the contract rate or who was harmed in any other way by the Company's failure to live up to the terms of the collective bargaining agreement, or the Union under such circumstances, has at all times the right to press the matter through grievance and arbitration procedure as provided in Section 19 of the agreement (R. 14).

The Supreme Court, *NLRB* v. *American Ins. Co., supra,* stated that management properly can bargain for the inclusion of a management prerogative clause in its contract with a labor organization. Since there was agreement of

the parties on the inclusion of such clause in the form of Section 17 of the instant contract, the Board cannot now be heard to complain that the Respondent is compelled to deal with the Union as though such clause did not exist by giving the Union access to individual merit increases. The inclusion of the clause had been settled across the bargaining table, and is not open to further determination by the Board.

The governing principle is recognized by the Board in *Tide Water Associated Oil Co.,* 85 NLRB 1096 (1949) where the Board held that terms and conditions embodied in a contract were not bargainable during the life of the contract. This principle was reaffirmed by the Board in *The Jacobs Manufacturing Co.,* 94 NLRB 1214 (1951) where it was held that the terms and conditions embodied in a contract were not bargainable during the life of the contract, and further, *that terms and conditions discussed in negotiations, even though not embodied in the contract proper, were also not to be considered bargainable issues during the life of the contract.* The theory was most ably stated by Chairman Herzog at page 1228. He wrote:

> "In the face of this record as to what the parties discussed and did, I believe that it would be an abuse of this Board's mandate to throw the weight of Government sanction behind the Union's attempt to disturb, in midterm, a bargain sealed when the original agreement was reached.
>
> *"To hold otherwise would encourage a labor organization—or, in a Section 8(b)(3) case an employer—to come back, time without number, during the term of a contract, to demand resumed discussion of issues which, although perhaps not always incorporated in the written agreement, the other party had every good reason to believe were put at rest for a definite period."* (Emphasis added.)

Therefore, since in the instant case at no time was the Union given the *"right"* to ascertain from Respondent the

compensation of the employees, if it ever possessed such right, it was waived through its negotiations with Respondent, culminating in the grant to Respondent of the prerogative of adjusting wage rates above the minimum set forth in the contract.

Section 8(d) of the Act states, in part, as follows:

> ". . . the duties so imposed shall not be construed as requiring either party to *discuss* or agree to any modification of the terms and conditions contained in a contract for a fixed period if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract." (Emphasis added.)

It is urged that the tenor of Section 8(d) looks toward the reaching of an agreement. The goal of the entire Act, as set forth in the preamble and in the case law decided under the Act, is the achievement of industrial peace and *stability*. In the instant case, an agreement was reached and thus, for the entire contract term, the Respondent was entitled to peace and stability as to all the terms agreed upon. Requests for the type of information sought in the instant case were barred by the terms of Section 17 of the contract, whereby the Union voluntarily excluded itself from the area to which this information pertains, so that the Board order requiring the Respondent to furnish this information forces it to agree to a modification of the contract terms.

The Union is seeking interminable discussion of items over which it gave the Respondent exclusive control. No inequity in the treatment of any specific employee was urged which might give the Union a claim of relevancy with respect to the desired information.

The information sought could not have been necessary for reopening the contract since Section 21(b) (R. 14) called for a simple across-the-board arithmetical adjustment which did not involve the names, compensation, hours or classifications of employees in the bargaining unit. Bearing this in

mind, and the fact that the contract is one in which adjusting rates above the minimum is an exclusive responsibility of management, the Union cannot now assert that it has a right to merit increase rate information on individuals above the contract minima.

As stated above, Respondent contends that in the light of the purpose of the Act the Union has absolutely no right to such information, but if it should be held to have such right it was contracted away by the Union by the express provisions of Section 17 of the collective bargaining agreement (R. 13).

B. The unfair labor practice remedy of which the Union attempted to avail itself was barred by a clause in the collective bargaining agreement governing disputes arising under the Agreement.

The parties, after engaging in collective bargaining, negotiated an agreement which contained the following clause:

> "*Section 19. Disputes.* When a dispute arises as to *the correct interpretation or application of any provision of this agreement,* it shall be referred to a representative of the Union and the store manager. These two, after investigation, shall attempt to settle such disputes. In the event these two cannot agree, they shall jointly request the Federal Mediation and Conciliation Service to submit a panel of five (5) arbiters, one of which shall be selected by the process of elimination. Then the dispute shall be reduced to writing and submitted to the arbiter who shall decide the matter. The decision of the arbiter, within the scope of the submission, shall be final and binding on the parties hereto. The expense of any proceeding provided for herein shall be borne equally by the employer and the Union" (R. 14). (Emphasis added.)

As a result of their mutually agreeing to the inclusion of this clause, the parties must avail themselves of the

grievance and arbitration machinery before choosing the medium of a Board remedy. The Union has in bad faith harassed the employer by the filing of an 8(a)(5) and (1) charge on matters which Respondent and Union had voluntarily agreed would be determined under the grievance and arbitration machinery (R. 94). This constitutes an evasion of the collective bargaining responsibility.

It is well established by the Board's own decisions that, where the parties to a collective bargaining agreement have established an arbitration procedure to resolve disputes during the period of a collective bargaining agreement, the Board will not exercise its authority to determine whether or not a violation of the agreement constitutes an unfair labor practice, unless very unusual and extenuating circumstances are presented dictating the necessity for the Board so to exercise its authority. *Consolidated Aircraft Corporation,* 47 NLRB 694, enf. as modified in other respects 141 F. 2d 785 (C. A. 9, 1944); *Timken Roller Bearing Co.* v. *NLRB supra; Midland Broadcasting Co.,* 93 NLRB 455 (1951).

There is no indication that the grievance and arbitration machinery as set up here has in the past failed in any way so as to justify the bypassing of it by either party.

In the instant case, the Respondent was given exclusive rights over incentive systems, adjustment of individual wage rates above minima contained in the agreement and the right to assign employees to jobs. Whether the Respondent's refusal to supply the requested wage data is justified involves questions as to the proper interpretation of the scope of Respondent's exclusive rights defined by the aforesaid clause. Such interpretation will permit a determination of whether the failure to supply the information requested is a violation of the Respondent's obligations. Section 19 (R. 14) of the agreement expressly provides that a dispute arising as to the correct interpretation or application of any provision shall be subject to the grievance and arbitration process.

Timken Roller Bearing Co. v. *NLRB, supra,* deals with the problem more specifically. Timken refused to bargain with the union about its subcontracting policy on the ground that the management prerogative clause vested exclusive control of subcontracting in the company. The Steelworkers then filed an 8(a)(5) charge against Timken for refusal to bargain collectively on subcontracting. The Sixth Circuit held that Timken was not engaged in an unfair labor practice and stated at pages 955-6:

> "[T]he dispute [about subcontracting] as it finally developed, was a dispute as to the interpretation of the management clause, and the contract specifically provided that such disputes were to be settled within the grievance procedures, and if they failed, by arbitration . . . The purpose of bargaining is to reach agreement resulting in a contract binding on both parties and providing the framework within which the process of collective bargaining may be carried on . . . If the law penalizes one party to the contract for standing on a bargain not itself violative of laws, there may still be compulsion to bargain, but the virtue of agreement vanishes . . . The law, we think does not compel such result."

In the instant case, the grievance charged was the Respondent's refusal to give wage data for which it felt the Union had asserted no valid reason and because the data had become the exclusive property of the Respondent by the management prerogative clause. Patently, this involves an interpretation of this clause to see if the Union had not barred itself from any right to the information, a matter therefore expressly subject to the grievance machinery. The Board would be undermining the stability of contracts by allowing one party to by-pass the grievance machinery and use the Board processes. This would be a reversal in the progressive trend in the field of labor relations.

There is no charge made here that the Respondent has ever refused to sit down with the Union at a time and place

convenient to both in order to confer. The collective bargaining agreement reached by the parties in 1952 was a result of the work of both sides toward a concord which would promote smooth functioning of the labor-management effort in the store. Collective bargaining is always a give-and-take proposition. There is a gain here, a sacrifice there. The "nos" will be found to be distributed as frequently as the "yeses." All the demands of both parties will, naturally, never be acceded to. It was not unusual, and surely not unlawful, for Respondent to fail to go along with the Union on its request for wage data. Respondent was, nonetheless, bargaining with the Union, whether consenting to or refusing a particular demand. The essence of bargaining is the cooperative willingness to discuss the issues at hand, not to give in to any certain request that might be made. This concept is set forth in Section 8(d) of the Act, which states:

> "(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party *but such obligation does not compel either party to agree to a proposal or require the making of a concession:*" (Italics supplied.)

For this reason the dispute did not arise under the statute as an unfair labor practice, a refusal to bargain, but rather the dispute arose under the interpretation of the contract terms governing the right in the Union to the information. To hold otherwise would be to allow the Board to add an unfair labor practice to the statute.

That the Courts do not favor an evasion of the grievance and arbitration machinery is manifested in *Lewittes &*

Sons v. *United Furniture Workers*, 95 F. Supp. 851, 856 (S. D. N. Y., 1951), where the Court stated:

> "The purpose of the Labor-Management Relations Act of 1947, 29 USCA §141 et seq. is to bring about peaceful solutions of labor disputes without recourse to industrial strife. Where the parties manifest a purpose to dispose of their disputes by arbitration rather than resort to economic force or pressures, their agreements should be liberally construed with a view toward the encouragement of arbitration. Kulukindis Shipping Co. v. Amtorg Trading Corp., supra. The courts should be reluctant 'to strike down a clause which appears to promote peaceful labor relations rather than otherwise.'"

It is clear that to uphold the Board's decision not only will the enunciated purposes of the Act be thwarted, but such affirmation will tend to disrupt all collective bargaining agreements. Parties to such agreements will no longer seek the peaceful means of settlement established by the contract through grievance machinery, but will seek immediate recourse in the Board.

POINT III

The Union is not entitled to the type of information requested since it is not necessary for or relevant to the administration of the Contract.

The Union has requested individual wage data for the broad purpose of "administration of the contract." It has not presented any specific reasons why the information is needed. It is not needed to negotiate or question individual wage increases, since the Union left exclusive responsibility in this field to the Respondent. Nor is it needed to negotiate a general wage increase under the wage adjustment clause, because one has already been granted and accepted

and, in any event, it was to be based on the cost of living increase.

The Board in its brief emphasizes the words "at least" and "a larger adjustment" in the Cost of Living Adjustment clause (Section 21(b)) to show that the clause contemplates negotiation. They disregard the words "*may* be made by mutual agreement by the parties." The word "may" indicates that any increase above the Cost of Living Index is purely voluntary.

> "Section 21. * * *
>
> "(b) Cost of Living Adjustment—On March 7, 1953, the basic minimum wage rates only as contained in Section 5, subsections (a) and (b) of this agreement shall be adjusted percentagewise to at least the percent of change in the National BLS Index during the period of February 1, 1952 and February 1, 1953.
>
> "Example: Assume that the 'new' Consumers Price Index of the Bureau of Labor Statistics increases five per cent (5%) in the specified period the said hourly rates of pay shall be increased no less [Record mistake has "loss"] than five per cent (5%). A larger adjustment in the hourly rates *may* be made by mutual agreement between the parties" (R. 14-15). (Emphasis supplied.)

The clause is titled a cost of living adjustment rather than a wage reopening clause as the Board attempts to label it. It contemplates an automatic increase and not negotiations, the latter being a characteristic of a wage reopening clause. Economic weapons of strike and lockout were barred during the adjustment period.

The Board also asserts that if the Union knew the actual wage it might have felt obligated to press for higher wages at the time of the adjustment. This is exactly what the clause agreed upon intends to avoid and if the Board's argument is accepted, it makes the words "cost of living

adjustment'' mere surplusage. It would eliminate the standard set up by the parties which was to work automatically.

No inequities have been alleged whereby someone might be receiving less than the minimum wage. The Union had access to information on minimum wages. Since no true need has been shown for the information, then, if a standard of relevancy is recognized, the Union's request must be refused.

A. The Courts have uniformly recognized a standard of relevancy to be applied to any requested wage information.

Tracing the Courts' attitude toward requiring employers to furnish wage information to unions, a standard of relevancy has been continuously respected. Though there has been a tendency on the part of the Board by administrative legislation to whittle away at what information an employer is allowed to withhold from the union, the Courts still have striven to keep within the standards of relevancy. While the cases are important to show that a standard of relevancy is recognized, the actual holdings in these cases are not applicable to the instant case, since their fact situations differ, which is vital to the rule of relevancy. The relevancy standard is best illustrated by examining the decisions of the Circuit Courts which have considered the question.

In the First Circuit, in *NLRB* v. *Leland Gifford, supra,* the Court affirmed the Board's language and stated that the requested information was *''relevant''* and therefore must be supplied by the company.

The relevancy standard was applied in the Second Circuit in a great number of cases, the first being *NLRB* v. *Yawman & Erbe, supra.* The Court, in deciding that the individual wage data must be given, said: ''We approve the Board's finding that the wage information for the year

1948 was 'clearly *relevant*' to the 1949 negotiations." (Emphasis supplied.)

Again, in *NLRB* v. *Jacobs Mfg. Co., supra,* the Court stated "As we interpret this, the requirement of disclosure will be met if the respondent produces whatever *relevant* information it has to indicate whether it can or cannot afford to comply with the Union's demands." (Emphasis supplied.)

In *NLRB* v. *Otis Elevator Co., supra,* the Court said "We think, therefore, that the general principles of free access to information *relevant* to bargainable issues must apply," and further on in the decision Judge CLARK, when referring to the time study data required in this case, says "Clearly, then, such data falls within the standard of *relevance* set forth by us in *N.L.R.B.* v. *Yawman & Erbe Mfg. Co. supra.*"

As late as February of 1954 the Second Circuit reiterated the standard of relevancy in *NLRB* v. *New Britain Machine Co., supra,* when a Board ruling that individual wage data must be supplied was upheld on the basis of the *Yawman* case *supra,* the *Jacobs Mfg. Co.* case *supra* and the *Otis Elevator Co.* case *supra.*

In the Seventh Circuit we find one illustration, *Aluminum Ore Company* v. *NLRB, supra,* tracing the recognition of the rule. The Court held that the union was entitled to "*pertinent* facts constituting the wage history of its members" and "all other facts *bearing* upon what constituted fair wages and fair increases."

Finally, in the Fourth Circuit, comes the totally anomalous decision in the field wherein the Court enforced a Board order requiring the employer to furnish individual wage data without reference to the relevancy standard. This is *NLRB* v. *Whitin Machine Works, supra.*

Though the Court cites as authority all the cases standing for the relevancy standard, it then affirms the Board's step into the field of legislation when it says:

> "that such information should not necessarily be limited to that which would be pertinent to a particular existing controversy."

This language accepts the Board's newly adopted idea that relevancy need not be shown. If the Board really means to drop the relevancy standard, then it is disregarding years of its own and judicial recognition of the standard and the very cases it cites as precedent. It is urged that this case should either be interpreted as following the cases it cites approving the relevancy rule and the rest of the decision be interpreted as dicta. The alternative is that the case should be disregarded as to its holding on the relevancy rule, since it is inconsistent with existing authority and constitutes a usurpation of the power of Congress when it revokes the need for relevancy and gives in its stead a *per se* right to all wage information to the Union.

The Board has frequently recognized limitations on the amount and form of information in relation to the relevancy criteria that an employer is bound to furnish a union. In the *Yawman* case, *supra*, the Board and the Court found that the union was entitled to the 1948 wage data but not the 1947 and 1946. The latter two years' information, they held, was irrelevant for purposes requested. There was no blanket ruling that all information, in any form that the union requests, must be given.

In *The Cincinnati Steel Casting Company,* 86 NLRB 592 (1949), the union had a list of workers and the employer was willing to furnish relevant information orally. The union demanded a written list of names with individual wage data, and the employer refused to give it in this form. The Board refused to hold the employer guilty of an 8(a)(5) violation. It said the employer's offer was sufficient and

that there was no bad faith shown when the information was offered in this form.

In *Old Line Life Insurance Company of America*, 96 NLRB 499 (1951), the Board held that an employer is not required to furnish information in the exact form requested by the bargaining representative. The Board stated, quoting *The Cincinnati Steel Casting Company* case, (*supra*), "It is sufficient if the information is made available in a manner not so burdensome or time consuming as to impede the process of bargaining." It then went on to hold, since the respondent had previously given to the union substantially the same information as it requests now during the negotiations and offered to verify its accuracy, that the respondent fulfilled its statutory obligation in this respect.

It is clear, as appears from the cases just cited, that each case must be decided on its own merits. The nature of the information required to be given will depend on the particular fact situation. In the instant case, the names have been given periodically, and the Union knows the classifications and minimum rates. The Board went beyond legitimate bounds when it held the Respondent is required to divulge all the information sought at this time in the form requested.

B. The per se rule lately adopted by the Board is in excess of its delegated authority and contrary to the terms of the Act.

A long line of cases has been determined by the Board and the Courts dealing with the duty to furnish information. As indicated above, up until recently the Court had limited the duty within the boundaries of relevancy. The first appearance of a *per se* doctrine as to the refusal to give relevant wage information appeared in *Cincinnati Steel Casting Company, supra,* where the Board bridged a wide gap when it stated:

> "As we have frequently held, an employer's refusal, during bargaining negotiations, to furnish necessary information to the representative of his employees shows a lack of good faith in bargaining, and constitutes, *in itself,* a violation of Section 8 (a) (5) of the Act." (Emphasis added.)

Thus, the Board attempted to legislate a new unfair labor practice into the Act, namely, the *per se* finding of refusal to furnish necessary information.

Six years later, the Board again stepped into the field of administrative legislation when it handed down the decisions in the *Whitin Machine* case, *supra,* and in the instant case. In the *Whitin* case the Board held that the union bargaining for a general wage increase was entitled to the requested individual wage data from the employer although such data was not necessary for any "particular existing controversy." This, coupled with the *Woolworth* decision, apparently announced a broad new rule, namely that it is an employer's statutory duty, enforcible by Board order and Court decree, to furnish a union practically any individual wage data it requests, either during negotiations or during the contract term, even though such data is not presently relevant to any existing bargaining issues and is of a private and confidential nature. It disregards the fact that the disclosure of the data—confidential to the individual—to the Union, and through it to other employees, is likely to create jealousy and unrest among employees and may result in reprisals against those who justly deserved merit increases.

This rule makes all requested information *per se* necessary, regardless of bargaining issues and regardless of its availability from other sources, such as its own members, provided only that it relates to the employment relationship. This is not in accord with the principles of the Taft-Hartley Act or the Administrative Procedure Act. Section 7 of the Administrative Procedure Act provides that the

proponent of an order should have the burden of proof to show its issuance would be proper and that the party charged have the right to defend. Relevant material should be introduced on both sides and an order should only be issued in consideration of all such evidence. Under a *per se* rule this statutory procedure is nullified.

Thus, in the instant case, when it is proved that the Respondent has refused to furnish any wage or related information requested by the Union, the decision of the Board is an automatic determination that the Respondent has committed an unfair labor practice. The need for a hearing would no longer be necessary. From the proof of refusal flows a conclusive presumption—a rule of law—that Respondent has unlawfully interfered with the rights of employees and has refused to bargain. This is an unwarranted extension of the Board's power. The Respondent would be guilty even though its relations with the Union always had been friendly and harmonious, even though it may have made concessions in current and past bargaining and reached agreement on all issues, refusing only to furnish some item of requested information which Respondent may regard as unnecessary, irrelevant, private or confidential.

A *per se* rule, when it came in conflict with a statute requiring a "good faith" standard, was expressly rejected by the Supreme Court in *NLRB* v. *American Ins. Co., supra.* In rejecting the Board's theory that a management prerogative clause is a *per se* violation of the duty to bargain in good faith, the Court said at page 410: ". . . a statutory standard such as 'good faith' can have meaning only in its application to the particular facts of a particular case." Since furnishing information is also governed by the "good faith" standard, then a *per se* violation rule must also be rejected in this situation and the refusal should be studied only in relation to the particular facts of the case. The Court, in discussion of a *per se* rule in relation to the words

"good faith" in the statute, carefully outlines to the Board, for future interpretation, the scope of the "good faith" concept. It is pointed out by the Court that "good faith" was expressly kept in the statute by the legislators in order that the Board may apply fitting rules for particular cases. No blanket rule was intended. In thus pointing out the faults in the Board's logic, the Court, at page 407, said:

> "If the Board is correct, an employer violates the Act by bargaining for a management functions clause touching any condition of employment without regard to the traditions of bargaining in the particular industry or such other evidence of good faith as the fact in this case that respondent's clause was offered as a counterproposal to the Union's demand for unlimited arbitration. The Board's argument is a technical one for it is conceded that respondent would not be guilty of an unfair labor practice if, instead of proposing a clause that removed some matters from arbitration, it simply refused in good faith to agree to the Union proposal for unlimited arbitration."

Following this language, in the instant case, it would be inconsistent with the theory of "good faith" bargaining to label *per se* the data refusal a violation. This is true particularly where such other factors must be considered as a baseless demand for this data in light of the terms of the contract and in the light of the fact that the bargaining stage for the agreement has wholly passed. This, coupled with the very nature of the retail industry, nullifies any Union claim of lack of "good faith" on Respondent's part, which standard the Board seeks to by-pass.

The fact that the information requested by the Union purports to be sought in the administration of and not in connection with the negotiation for the contract further negatives the Board's holding that this is a violation by the Respondent and the use of the *Whitin* case *per se* doctrine. Again, the edict of the Court in the *American*

Ins. Co. case throws some light on this problem, when it states at pages 408-9:

> "Congress provided expressly that the Board should not pass upon the desirability of the substantive terms of labor agreement. Whether a contract should contain a clause fixing standards for such matters as work scheduling or should provide for more flexible treatment of such matters is an issue for determination across the bargaining table, not by the Board. If the latter approach is agreed upon, the extent of union and management participation in the administration of such matters is itself a condition of employment to be settled by bargaining."

Since participation in administration of the substantive terms of the contract is to be settled by collective bargaining and not by the Board, the fact that the contract involved in the instant case gives absolute rights to the Respondent on wage increases would make this requested information irrelevant as serving no administrative purpose in an area in which the administrative rights have been bargained away by the Union.

A holding of a *per se* violation would be improper under the "good faith" standard referred to above. The Supreme Court further emphasized that it intends to have the facts of each particular case examined by the Board when "good faith" is involved, when it stated at page 409:

> "Accordingly, we reject the Board's holding that bargaining for the management functions clause proposed by respondent was, per se, an unfair labor practice. Any fears the Board may entertain that use of management functions clauses will lead to evasion of an employer's duty to bargain collectively as to 'rates of pay, wages, hours and conditions of employment' do not justify condemning all bargaining for management functions clauses covering any 'condition of employment' as per se violations of the Act. The duty to bargain collectively is to be enforced by application of the good faith bargaining

> standards of Section 8(d) to the facts of each case rather than by prohibiting all employers in every industry from bargaining for management functions clauses altogether."

It is also contended that recognition of a *per se* right to the requested data will give rise to a practice interdicted by the law. It is in the nature of a harassing "fishing expedition" for evidence. The Supreme Court in *Fed. Trade Comm.* v. *Amer. Tobacco Co.,* 264 U. S. 298, 305 (1924), voiced its opinion of the practice when it stated:

> "Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire (*ICC* v. *Brimson,* 154 US 447, 449), and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime . . . It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up."

The *per se* rule will not tend to decrease industrial strife but, on the contrary, it will tend to increase it. The logic of the relevancy rule should not be cast aside on the basis of the Board's convenience of not having to examine each fact situation where a dispute arises to determine if the information is relevant or not.

C. Substantive terms of the Collective Bargaining Agreement are not issues for determination by the Board.

The Supreme Court has expressly recognized that the Board shall not pass upon the desirability of the substantive terms of a contract. In *NLRB* v. *American Ins. Co., supra,* it stated at 408-9:

> "Congress provided expressly that the Board should not pass upon the desirability of the substan-

> tive terms of labor agreements. Whether a contract should contain a clause fixing standards for such matters as work scheduling or should provide for *more flexible treatment* of such matters is an issue for determination across the bargaining table, not by the Board." (Emphasis added.)

The duty to furnish information requested by the Union is not a substantive term of an agreement but it is a flexible treatment or interpretation of substantive terms which are not issues for determination by the Board. There is nothing left for determination during the life of the contract in the instant case. At the bargaining table the Respondent and the Union had agreed and settled all matters pertaining to wages, hours and working conditions, including that of the management prerogative functions, Section 17 of the contract. The Respondent unequivocally was given the right "to adjust wage rates above those contained in this agreement." The contract called for minimum wages only. Since these substantive terms were agreed upon by the parties, the Board may not in any way, directly or indirectly, change the effect of them by requiring the Respondent to give information about matters over which it was given exclusive control. Therefore, because of its interrelation with the negotiated substantive terms, the requested information is not an issue for Board determination.

Conclusion

Petitioner in its brief (pp. 12, 13) quotes the clause of the contract which provides that the right "to adopt or remove incentive or bonus systems, to adjust wage rates above those contained in this agreement * * are exclusive responsibilities of the Employer" and then attempts to destroy the recognized rights by arguing, without citation of justifying text, that there was a statutory right in the Union to the contrary and (pp. 14, 15) that the Union

required the information to determine whether it was justified "in continuing in future contracts to waive its right to bargain over wage adjustments above the minimum."

Findings by the Board on such matters of legal construction and legal relevancy should not be considered by this Court as proper findings of fact.

To uphold the Board's order alleging that the Respondent violated 8(a)(5) and (1) for refusal to furnish individual wage data would be to disregard the Congressional intention, expressed in the new Act, to safeguard the rights of the individual employees. This protection was not expressed in the Wagner Act. Flowing from these safeguards is the right of privacy which, among other things, insures an employee's freedom from interference therewith from his employer and his union. A rule requiring an employer to furnish to the union the individual wage data above the minimum set by the contract violates this right of privacy which an employee has in confidential matters such as his actual wage and coerces the employer to violate a confidence reposed in him. The Board and the Courts, to date have in wage data cases based their conclusions on the Wagner Act and precedents thereunder which did not reflect the present labor philosophy of protection of the individual employee. Such is no longer any authority and therefore should be disregarded now. Initial recognition by a Court of the right of privacy in a wage data case only recently occurred (*NLRB* v. *Boston Herald-Traveler Corp., supra*) as the policies of the new Act begin to be put into practice.

The Union, by agreement to the management prerogative clause, waived any right which it might have to individual wage data by giving the Respondent exclusive rights in the field of merit increases. It has urged no grounds for the right to this information other than those in the area from which they voluntarily excluded themselves in the collective

bargaining agreement. There is no claim that data on minimum wages is not available to them.

The Union also by contract agreed that any dispute arising over the interpretation of a contract clause should be subject to the grievance and arbitration machinery. Since the issue of furnishing of individual wage data is based on the interpretation of the management prerogative clause, the Union should have, but did not, exhaust their contract remedies before resorting to the Board medium. The Board's order will abet evasion of the contract remedies and render grievance and arbitration clauses previously encouraged, inoperative.

If there is any privilege in the Union to obtain the wage data from the Respondent, then even under the line of cases requiring wage data to be furnished, the employer's duty is limited by the relevancy standard. The Board tried to do away with the relevancy rule and to substitute a *per se* right to individual wage data in the union regardless of its relationship to a particular existing controversy. Such a *per se* rule is contrary to the Act requiring "good faith" bargaining which insures that the particular facts of each alleged violation will be considered by the Board and is contrary to the Courts' recognition of the relevancy standard. It is, in effect, administrative legislation created for the purpose of easing the burden on the Board in passing on these cases. In its elimination of the relevancy requirements the Board simply accords the Union carte blanche in its demands upon the employer.

Since the Union has shown no relevancy in the information sought, for any proper purpose, the Board's order varies the effect of the substantive terms of the collective bargaining agreement, namely, the management prerogative clause. Such terms are matters to be determined at the collective bargaining table and not by the Board. As matters stand as a result of this decision, despite the fact that an accord has been reached by the signing of the col-

lective bargaining agreement, the Union would be permitted to indulge in endless further questioning of the employer and thus discourage the harmony encouraged by the Act in its sanction of collective bargaining agreements.

For the foregoing reasons, it is respectfully submitted that the Board's petition should be dismissed and its order vacated and set aside.

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APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, *et seq.*), are as follows:

"UNFAIR LABOR PRACTICES

"SEC. 8.(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of the section 9(a).

* * * * *

The Findings and Declaration of Policy of the Wagner Act reads as follows:

"§151. Findings and declaration of policy

"The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

"The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

"Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargining power between employers and employees.

"It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."